HARON v. MACAULAY

[F.C. (Barkbah L.P., Suffian & MacIntyre F.JJ.)]
October 5, 1968]

[K.L. — Federal Court Civil Appeal No. X.91 of 1967]

Practice and Procedure — Admissions by counsel — Whether binding on party.

Damages — Personal injuries — Fracture of ribs, loss of teeth and concussion of brain — Permanent loss of memory regarding accident — Prolapse of discs — Assessment of damages — Assessment based on admissions by counsel — Whether binding on party — Contributory negligence.

Negligence — Highway — Failure to give adequate warning to vehicle following closely behind.

This was an appeal against the judgment of the High Court at Johore Bahru in an action for damages for personal injuries sustained in a road collision. The respondent suffered injuries including the fracture of the 2nd, 3rd, 4th and 7th ribs, loss of 5 teeth in the lower jaw and fracture of six in the upper jaw besides suffering from concussion of the brain. He was rendered unconscious and did not regain consciousness till the following morning at the Johore Bahru Hospital. The permanent results of the injuries sustained appear to be, loss of memory in regard to how the accident happened and a prolapse of the discs between the 5th and 6th vertebrae and between the 6th and 7th vertebrae. According to medical evidence the only permanent effect of prolapsed discs would be general weakness of the body. The court, basing its decision on certain admissions made by counsel who then represented the appellant, assessed a sum of $99,520 as general damages and $3,556.90 as special damages. It also held that the collision was caused by contributory negligence on the part of the appellant and the respondent in the proportion of 2/3 and 1/3 respectively.

Held, dismissing the appeal: (1) the appellant was bound by the admissions made by counsel who represented him, and the question of quantum should be approached on the basis of those admissions;

(2) in this case there was every indication that allowance had been made for usual contingencies since the life expectation of the respondent as agreed was 13 years from the date of the accident and the agreed multiplier was only 8.

Obiter: Although the award in this case might be on the high side, it was not excessive. As a result of the accident the respondent had to return to the United Kingdom where the cost of living is much higher and no consideration appears to have been given on that account.

FEDERAL COURT.

D.L. Pickard (*M. Samuel* with him) for the appellant.

Denis Murphy for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgment of my brother MacIntyre F.J. with whom I agree that the appeal and cross-appeal should be dismissed with costs.

MacIntyre F.J.: The appellant appeals against the whole of the judgment of the High Court at Johore Bahru in an action for damages brought against him by the respondent for personal injuries sustained in a collision between their respective motor vehicles.

In assessing a sum of $99,520 as general damages and a sum of $3,556.90 as special damages, the learned trial judge held that the collision was caused by contributory negligence on the part of the appellant and the respondent in the proportion of 2/3 and 1/3, respectively. Accordingly, judgment was entered in favour of the respondent for 2/3 of the amount assessed and costs. The respondent cross-appeals against the finding of contributory negligence on his part.

It would appear from the evidence that on May 3, 1964 the appellant, carrying a passenger, was driving his taxi on the Johore Bahru-Ayer Hitam Road, when at about the 32nd milestone the passenger who had reached his destination asked him to stop. The appellant suddenly slowed down his car and stopped about a chain away on the left side of the road. The time then was about 7 p.m. It was raining and visibility was poor. Within 4 to 5 seconds of the car stopping, a car driven by the respondent came up from behind and crashed into the off-side back portion of the stationary taxi, in consequence of which the taxi turned to its left and lurched forward into the ravine on the left side of the road. The respondent's car then stopped a few feet beyond the place of impact. As a result of the impact, the respondent was thrown forward against the steering wheel and sustained injuries including the fracture of the 2nd, 3rd, 4th and 7th ribs, loss of 5 teeth in the lower jaw and fracture of six in the upper jaw besides suffering from concussion of the brain. He was rendered unconscious and did not regain consciousness till the following morning at the Johore Bahru Hospital. The permanent results of the injuries sustained appear to be loss of memory in regard to how the accident happened and a prolapse of the discs between the 5th and 6th vertebrae and between the 6th and 7th vertebrae. According to medical evidence the only permanent effect of prolapsed discs would be general weakness of the body.

One of the common causes of accidents of this nature is the failure on the part of the driver of a vehicle while driving at a fast speed on a country road to give adequate warning to vehicles following closely behind of his intention to either slow down or stop his vehicle. Since the collision in this case happened within 4 or 5 seconds after the appellant's taxi had stopped, the question of whether he gave adequate warning is a matter of utmost importance in assessing liability for the accident. The appellant when making his report of the accident to the police made no mention of giving any warning; nor did he say anything about it when giving

evidence before the magistrate in a case in which the respondent was charged with inconsiderate driving in regard to the same accident and acquitted. The first time he ever mentioned about giving a warning was at the hearing of the present action. Even then he did not say what kind of warning he had given. His counsel who appeared before us submitted that, in any event, a hand signal at night would not have been effective but the brake lights would have given adequate warning. We were asked to presume that the car was fitted with brake lights because all modern manufactured cars are fitted with them. There is no evidence that the brake lights in the appellant's car, if any, were functioning that night. However, the learned trial judge after considering all the facts and circumstances of the case did not accept the evidence of the appellant that he had signalled before he stopped his taxi. Since the learned judge has had the advantage of seeing and hearing the witness, we do not feel disposed to interfere with his finding.

In regard to the cross-appeal it is true that the learned judge found, on no evidence whatever, that the respondent had contributed to the accident because the headlights of his car had not been switched on at the time of the collision. It is clear, however, that the accident happened because the respondent was unable to draw up or swerve his car to the right side of the road within the limit of his vision, which is indicative of the fact that he must have driven at a speed unwarranted by the poor visibility prevailing at that time. We, therefore, agree with the finding of the learned trial judge that the respondent was guilty of contributory negligence and the proportion of that negligence was one-third as against the appellant's share of two-thirds.

In regard to quantum, counsel for the appellant considered the assessment in respect of general damages excessive. However, it would appear from the notes recorded by the trial judge that the assessment was based on certain admissions made by counsel who then represented the appellant. We are therefore of the opinion that the appellant is bound by those admissions and that the question of quantum should be approached on the basis of those admissions. Appellant's counsel in the court below conceded the following points, *viz.*, (i) that in consequence of disabilities arising from injury sustained in the accident, the respondent's earning capacity had been reduced to $600 per month; (ii) that the respondent, who at the time of the accident was 52 years of age had a life expectation of 65 years; (iii) that the respondent at the time of the accident was in receipt of a sum of $1,300 as basic salary and $300 as C.O.L.A. amounting in the aggregate to $1,600 per month; and (iv) in assessing damages for loss of future income, the number of years of purchase should be 8. However, counsel for the appellant who appeared before us contended that 8 years' purchase should be reduced as there is no indication that any allowance had been made for the usual contingencies. In our opinion, there is every indication that allowance had been made for usual contingencies since the life expectation of the respondent as agreed was 13 years from the date of the accident and the agreed multiplier is only 8.

The learned trial judge assessed loss of future earnings at the rate of $12,000 per year or $1,000 per month; that is to say, $1,600 less $600 which had been agreed upon by the parties as the amount the respondent was likely to earn in the future as a result of disabilities arising from the injuries. He therefore awarded the respondent to account of loss of future earnings a sum of $77,500 being the sum which according to actuarial table would be necessary to purchase an annuity of $12,000 a year for 8 years. To this sum he added a further sum of $22,000 being damages for pain and suffering and loss of amenities. The total sum assessed was, therefore, $99,520 plus, by consent, a sum of $3,556.90 being special damages. The actual amount awarded to the respondent was $68,717.94 being two-thirds of the sum assessed on account of deduction in respect of contributory negligence.

In regard to the sum of $22,000 assessed for pain and suffering and loss of amenities, appellant's counsel had himself suggested in the court below that a reasonable sum for pain and suffering would be $15,000. Therefore, the remaining $7,000 must be deemed to have been awarded for loss of amenities. Although this award may be on the high side, we do not think it is excessive. As a result of the accident the respondent had to return to the United Kingdom where the cost of living is much higher and no consideration appears to have been given on that account.

In the result the appeal and the cross-appeal are dismissed with costs.

Suffian F.J. concurred.

Appeal and cross-appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Murphy & Dunbar.*